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Ex Parte Submission – Filed Electronically Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licenses; MB Docket No. 10-56

Dear Ms. Dortch:

In its letter dated December 29, 2010, Comcast ignores the important policy issues implicated by its demand that Level 3 pay Comcast's unilaterally-set rate for access to its subscribers, and denies that the request for payment has anything to do with the pending NBCU transaction. Instead, Comcast repeats that the matter is merely a private commercial "peering" dispute. But, given the fundamental policy considerations discussed in the Commission's Report and Order issued on December 23, 2010 (the "Open Internet Order"), it seems clear that the issues that underlie the dispute are much more important than a private commercial "peering" dispute.

1. Should the Commission ignore these issues in connection with the Comcast/NBCU transaction because the issues were raised at the "eleventh hour"?

No. While it is true that Level 3 did not raise Comcast's ability to use Internet interconnection as a means to obtain discriminatory payments earlier in this proceeding, there is a simple reason for that – Comcast did not make any demand for such payment until late November 2010. Until that time, Level 3 was not aware of any company in the U.S. that owns both a broadband Internet access service provider and a backbone service provider that had attempted to charge an independent Internet backbone provider like Level 3 for interconnecting to deliver content requested by its consumer subscribers. Level 3 had no reason to suspect that Comcast would embark on an anticompetitive effort to coerce payment for access to its broadband subscribers.

2. Should the Commission ignore these issues as a part of its evaluation of the Comcast/NBCU transaction because it is only a narrow "old-fashioned peering dispute"?

No. Comcast's claim that the dispute is merely and only a private commercial matter is inconsistent with the basic policy considerations that underpin the Commission's Open Internet Order – and those policy considerations are directly impacted by the increased incentives for discriminatory conduct that will result from consummation of the proposed NBCU transaction. In the Open Internet Order, the Commission repeatedly stressed that action to preserve an open Internet was required for

several reasons which are directly implicated by Comcast's recent efforts to leverage its broadband customer base to impose interconnection fees:

- Comcast has significant market power in connection with the provision of broadband service to residential consumers.

"The risk of market power is highest in markets with few competitors, and most residential end users today have only one or two choices for wireline broadband Internet access service. As of December 2009, nearly 70 percent of households lived in census tracts where only one or two wireline or fixed wireless firms provided advertised download speeds of at least 3 Mbps and upload speeds of at least 768 Kbps—the closest observable benchmark to the minimum download speed of 4 Mbps and upload speed of 1 Mbps that the Commission has used to assess broadband deployment. About 20 percent of households are in census tracts with only one provider advertising at least 3 Mbps down and 768 Kbps up. For Internet service with advertised download speeds of at least 10 Mbps down and upload speeds of at least 1.5 Mbps up, nearly 60 percent of households lived in census tracts served by only one wireline or fixed wireless broadband provider, while nearly 80 percent lived in census tracts served by no more than two wireline or fixed wireless broadband providers." Open Internet Order, paragraph 32.

- Comcast also has interests in telephone, television and video services that compete with online content and services offered by edge providers.

"Online content, applications, and services available from edge providers over broadband increasingly offer actual or potential competitive alternatives to broadband providers' own voice and video services, which generate substantial profits. Interconnected Voice-over-Internet-Protocol (VoIP) services, which include some over-the-top VoIP services, 'are increasingly being used as a substitute for traditional telephone service,' and over-the-top VoIP services represent a significant share of voice-calling minutes, especially for international calls. Online video is rapidly growing in popularity, and MVPDs have responded to this trend by enabling their video subscribers to use the Internet to view their programming on personal computers and other Internet-enabled devices. Online video aggregators such as Netflix, Hulu, YouTube, and iTunes that are unaffiliated with traditional MVPDs continue to proliferate and innovate, offering movies and television programs (including broadcast programming) on demand, and earning revenues from advertising and/or subscriptions. Several MVPDs have stated publicly that they view these services as a potential competitive threat to their core video subscription service. Thus, online edge services appear likely to continue gaining subscribers and market significance, which will put additional competitive pressure on broadband providers' own services." Open Internet Order, paragraph 22.

- Especially considering its significant market power, Comcast has the incentive and the means to disadvantage independent content and applications that its subscribers want to use by charging fees for access to those subscribers, becoming a “gatekeeper” in the Internet.

“Although these threats to Internet-enabled innovation, growth, and competition do not depend upon broadband providers having market power with respect to end users, most would be exacerbated by such market power. A broadband provider’s incentive to favor affiliated content or the content of unaffiliated firms that pay for it to do so, its incentive to block or degrade traffic or charge edge providers for access to end users, and its incentive to squeeze non-prioritized transmission will all be greater if end users are less able to respond by switching to rival broadband providers.” Open Internet Order, paragraph 32.

“[B]roadband providers may have incentives to increase revenues by charging edge providers, who already pay for their own connections to the Internet, for access or prioritized access to end users. Although broadband providers have not historically imposed such fees, they have argued they should be permitted to do so. A broadband provider could force edge providers to pay inefficiently high fees because that broadband provider is typically an edge provider’s only option for reaching a particular end user. Thus broadband providers have the ability to act as gatekeepers.” Open Internet Order, paragraph 24.

- Because Comcast also owns significant content and proposes to acquire even more content through the NBCU transaction, the incentive to engage in discriminatory behavior is increased.

“Consistent with these concerns, delivery networks that are vertically integrated with content providers, including some MVPDs, have incentives to favor their own affiliated content. If broadband providers had historically favored their own affiliated businesses or those incumbent firms that paid for advantageous access to end users, some innovative edge providers that have today become major Internet businesses might not have been able to survive.” Open Internet Order, paragraph 23.

Rather than acknowledging that Comcast’s imposition of fees undoubtedly adds a discriminatory cost to the delivery of independent content carried by Level 3, Comcast instead argues that Level 3 should pay because – ironically – Comcast’s subscribers are requesting more and more content from Level 3’s edge provider customers. Yet the ability to “download” from the Internet is at the heart of the service that Comcast offers to its subscribers. Comcast’s service is engineered to deliver five times more download capacity than upload capacity, and its subscribers expect Comcast to provide unimpeded access to all of the lawful content available on the Internet (up to the monthly limit contractually imposed by Comcast on its subscribers). By delivering the requested content to Comcast, Level 3 actually enables Comcast to fulfill its promise to its subscribers. And yet Comcast’s core

justification for charging Level 3 an interconnection fee is a “traffic imbalance” which is an inherent characteristic of the current and future nature the Internet as consumers increasingly demand high bandwidth video content.

3. If no toll is charged directly against edge providers that compete with Comcast and NBCU services or content, should the Commission ignore the issue in its evaluation of whether the merger meets the public interest test?

No. Comcast is erroneously asserting that assessing a toll against an independent backbone carrier, or assessing a toll in a different manner or location within the network with the same effect on edge providers, is distinguishable from a destructive toll levied directly against an edge provider. However, most edge providers do not own either an access or a backbone network, and only the largest edge providers have the ability to interconnect directly with broadband Internet access service providers. Rather, most edge providers use the services of one or more Internet backbone providers like Level 3 to carry traffic to and from the broadband Internet access networks serving their consumer customers. Assessing a toll directly against an edge provider under these circumstances would be difficult at best – the broadband access provider would have to inspect packets delivered to its network, invent a pseudo-contractual obligation on the edge provider to pay a toll, and take actions to enforce the obligation (presumably by blocking) in the event that the toll isn’t paid.

A toll on independent content levied on a “backbone carrier” presents exactly the same discrimination or gatekeeping issues as a direct toll on the edge providers themselves. The backbone carrier must have some relationship with the broadband Internet access company in order to interconnect and exchange Internet content between the networks. It is precisely this interconnection arrangement that Comcast seeks to use as its tool to extract a toll. And it is this interconnection which Level 3 must exclusively obtain from Comcast since there is no way to bypass or “route” around Comcast, or otherwise reach Comcast’s consumer customers.

If Comcast is allowed to leverage its dominant position in consumer broadband Internet access by the simple expedient of requiring paid interconnection in a number of locations chosen at its sole discretion, and then referring to its own exclusive transport of content from these locations to its broadband Internet access networks as a “backbone service,” then Comcast’s broadband subscribers’ unimpeded access to the Internet is clearly in jeopardy. This is precisely the kind of service that the Commission sought to ensure was not excluded from the scope of the Open Internet Order by clarifying that the rules apply to broadband Internet access service or any other service that:

“...the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.” Open Internet Order, paragraph 44.

4. Should the Commission ignore the matters raised by Level 3 in the NBCU transaction evaluation, and instead deal with Comcast's behavior in enforcement proceedings under the Open Internet Order?

No. Comcast stated in its December 22 letter (which was submitted before the text of the Open Internet Order had been publicly released) that the Open Internet Order "resolves any concerns in this area." In making this assertion, it appears that Comcast is willing to concede that (a) the Commission has jurisdiction to impose and enforce the Open Internet Order, and (b) the Open Internet Order applies to its conduct in connection with interconnection and exchange of Internet traffic between it and Level 3. If not, Comcast's assertion is a red herring. And even if Comcast is willing to make those concessions, that would not answer the fundamental question the Commission must answer in the pending transfer proceeding – whether the applicants' proposal is consistent with the public interest. Given (a) Comcast's actions vis-à-vis Level 3 toward the end of the Commission's review process – actions which, while nominally directed at Level 3 are, in reality, directed at competitive content sources; (b) the increased incentives Comcast will have to impair competitive content if it gains control of the vast array of NBCU programming in addition to its existing video offerings; and (c) the significant risk that Comcast will seek to expand its gatekeeper role to other large backbone networks that are utilized by the substantial majority of edge providers to connect to Comcast's consumer customers, the Commission can find the proposed transaction to be consistent with the public interest only by adopting and enforcing the conditions that we suggested in our December 16 letter. These proposed conditions adhere to the same policy considerations that serve as the foundation for the Commission's Open Internet Order.

In sum, given the magnitude of the transaction between Comcast and NBCU, and the increased incentive for Comcast to continue to engage in (and in fact expand) its role as a gatekeeper for access to its subscribers, requiring Comcast to act in a fair, reasonable and nondiscriminatory manner is required.

Sincerely,

A handwritten signature in cursive script that reads "John Ryan".

John M. Ryan
Assistant Chief Legal Officer
Level 3 Communications, Inc.

cc: Sharon Gillett
John Flynn
Rick Kaplan
Edward Lazarus